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No. 02-597

IN THE SUPREME COURT OF THE UNITED STATES

CAPITAL CASE

JEANNE WOODFORD, Warden,
California State Prison at San Quentin,
Petitioner,

vs.

MICHAEL WAYNE JENNINGS,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND FACTUAL BACKGROUND

This pre-AEDPA case comes before the Court following an evidentiary hearing in the U.S. District Court for the Northern District of California on a claim of attorney ineffectiveness at both phases of this capital trial. A claim that trial counsel suffered from multiple conflicts of interest was found to be meritorious enough to warrant the issuance of a Certificate of Appealability, but the court below did not reach the merits of the conflict claim because the court granted relief on the attorney ineffectiveness claim.

Michael Wayne Jennings ("Jennings") was arrested on August 12, 1982 for the capital murder of his parents' next door neighbor, 62 year old Violet Newman, and was

prosecuted in Contra Costa County, California. He was represented for five weeks by Carol Babington, a deputy public defender. During her short stint at Jennings' attorney, Babington hired a psychiatrist to interview Jennings (a "most preliminary gesture" Babington told the district court during the evidentiary hearing on trial counsel's ineffectiveness) so that prosecutors could not later claim she had unreasonably delayed in having him medically examined. Babington conflicted out of the case and Attorney Michael Oliver[1] was appointed on September 24, 1982. Babington believed that there was much more for defense counsel and a psychiatric expert to do to prepare the case for trial. Specifically, she recognized that evidence of Jennings' addiction to methamphetamine existed even when she had the case, and that this evidence could have provided a complete defense at guilt phase and mitigation at penalty phase.

Attorney Oliver represented Jennings from the time of his appointment in September, 1982, through trial, which concluded with a death judgment in February, 1984. Oliver never consulted any mental health expert in connection with the guilt or penalty phase defense of Jennings' case. Attorney Oliver never spoke to Dr. Hjortsvang about the interview he did with Jennings when Attorney Babington represented Jennings. Attorney Oliver did not conduct any investigation into Jennings' mental functioning, nor did he investigate Jennings' family background or upbringing. The guilt phase defense was a mixed alibi/intoxication defense, both of which were poorly investigated and were largely unsupported by evidence. The penalty phase defense was that Jennings had been

[1] Attorney Oliver has since been disbarred by the State Bar of California.

a "good snitch" for the local police department, and that he had turned in his own brother for possessing marijuana – that Jennings had planted on him.

In fact, abundant and compelling evidence existed, which Attorney Oliver knew or should have known, which demonstrated Jennings was seriously mentally impaired at the time this crime occurred, due to his underlying mental illness and to his long term abuse of methamphetamine, which had developed into acute amphetamine psychosis.[2] Numerous witnesses were available and could have so testified, but trial counsel never conducted such an investigation. Additionally, a wealth of evidence existed to establish that Jennings had been raised in a home environment that was both psychologically and physically abusive. None of this evidence was uncovered or presented to the jury which decided Jennings' fate.

Petitioner's first contention is that Jennings never wanted any mental mitigation defense presented at trial - and therefore trial counsel had no duty to investigate and present such a defense. This assertion is a factual misstatement. The trial transcript itself plainly shows a colloquy with Jennings in which he personally assented to lesser included offense instructions – mental state mitigation instructions – being given on his behalf.[3]

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[2] In fact, at the time Jennings was arrested in this case, jail medical personnel noted in his file that he was suffering from amphetamine psychosis and auditory and visual hallucinations. District Court Evidentiary Hearing Transcript at 378-81.

[3] See Appendix A, trial transcript colloquy with Respondent Jennings, in which he specifically agrees to instructions on lesser included murder/manslaughter instructions being give to the guilt phase jury.

Additionally, and rather incredibly, Respondent then seeks this Court's intervention by asserting that California law does not permit the giving of lesser included offense instructions under the facts presented by this case. First of all, this argument was never advanced by Petitioner until the Petition for Rehearing in the Ninth Circuit[4], and so has been waived. But more importantly, this whole series of lesser included offense instructions *were given at Jennings' trial*[5], following extensive discussion between defense counsel, the court and the prosecutor. Thus, those involved in the trial assumed, and rightly so, that second degree murder, manslaughter and involuntary manslaughter instructions should be presented to the guilt phase jury. Consequently, neither the factual nor the legal foundations for Petitioner's arguments exists.

Secondly, Petitioner contends that the Ninth Circuit has repeatedly circumvented this Court's rulings in granting relief in capital habeas corpus cases. Petitioner's second "question" really amounts to nothing more than a complaint about the Ninth Circuit's reversal rate. The Ninth Circuit's decision in this pre-AEDPA case[6], is based solidly on this Court's decisions concerning trial counsel's prejudicial ineffectiveness.

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[4] This case has been pending in federal court since 1989. The first time this argument was made was in 2002. Obviously, the issue does not have the earth-shaking significance as that claimed by Petitioner, or it would have arisen in the thirteen years of litigation which preceded its mention. Petitioner has been on notice of these facts, and this legal issue, since a state habeas petition was filed in May, 1993.

[5] See Appendix B, lesser included offense instructions given at conclusion of guilt phase.

[6] The original habeas corpus petition was filed in the U.S. District Court for the Northern District of California in 1991. After state exhaustion proceedings, which did not include any state evidentiary hearing or fact development procedures, an amended petition was filed in district court on January 31, 1994. Thus, this case pre-dates the application of AEDPA.

I THE NINTH CIRCUIT'S CONCLUSION THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BECAUSE HE FAILED COMPLETELY TO INVESTIGATE OBVIOUS MENTAL STATE MITIGATION WAS BASED ON SOUND PRECEDENT

The Supreme Court of California[7] and Petitioner agree that the evidence presented at trial against Michael Jennings was a strong circumstantial evidence case. This is the evidentiary hurdle trial counsel confronted in deciding how to best defend Jennings.

The public defender who initially represented Jennings had a psychiatrist conduct an initial "completely preliminary" interview with Jennings. She then conflicted out of the case, but recognized that there were methamphetamine intoxication issues in the case which could provide a complete defense to first degree murder for Jennings.[8] She knew that there was much more investigation to be done if such a defense was going to be presented for Jennings.[9]

Within two weeks of being appointed to represent Jennings, Attorney Oliver had decided he was not going to present mental defenses at either phase of the case. This decision never changed[10], despite the fact that Attorney Oliver learned the following information about his client's mental impairments: he knew that Jennings had tried to commit suicide while married (EHRT 1076); he knew that Jennings' ex-wife had described him as crazy to police (EHRT 1078); he knew that Jennings had slit his wrists

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[7] *People v. Jennings,* 46 Cal.3d 963, 972-74 (1988).

[8] District court evidentiary hearing transcript [EHRT] 337, 381.

[9] EHRT 383.

[10] EHRT 1090-91.

during the course of an argument with his ex-wife (EHRT 1079); he knew that Jennings had been strung out on methamphetamine for over a year (EHRT 1102); he knew that Jennings told the police that he had memory problems due to being strung out on crank, and that the drugs interfered with his ability to recall the events of the night of the homicide (EHRT 1103); he knew that a syringe had been seized from Jennings' truck (EHRT 1103); he knew that Jennings' ex-wife reported to the police that Jennings had previously been diagnosed as schizophrenic (EHRT 1104); he knew that Jennings' friend, Chuck Pendleton, told police that Jennings had a split personality (EHRT 1104-05); he knew that Jennings' former co-workers made derogatory comments about Jennings' mental health (EHRT 1105); he knew that Jennings' had been committed by a judge pursuant to Welfare & Institutions Code § 5150, as being "catatonic" (EHRT 1106-08); he knew that at the time of the offense, Jennings was homeless and living out of his truck (EHRT 1109); and, he knew that Jennings had a long history of injuring himself intentionally and pouring liquids into the resulting wounds, thereby causing gangrene (EHRT 1110).[11]

The Ninth Circuit observed that even though Attorney Oliver was aware of these facts, he did not request copies of Jennings' voluminous medical records; did not investigate whether there had been child abuse in the family; did not seek the appointment of experts to evaluate Jennings' mental state or the possible effects of

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[11] See also Ninth Circuit Opinion, Petitioner's Appendix at 15-16, which makes factual findings consistent with this testimony.

methamphetamine on such a heavy, long term user; did not discuss Jennings' drug use with him or with his drug partners; did not follow up on reports that he had attempted suicide; that Jennings had been diagnosed as schizophrenic; that Jennings' ex-wife believed he was crazy; and did not follow up on Jennings' involuntary commitment when he appeared catatonic.[12]

At the evidentiary hearing, Dr. Karen Gudiksen, Jennings' psychiatric expert[13], testified that her review of the case uncovered a documented history of mental illness, including paranoid schizophrenia and severe alcoholism; consistent beatings of Mr. Jennings and his brothers by both parents throughout the boys' childhoods; molestation by both his grandfather and mother; and a pattern of self mutilation that began when Jennings was just six years old and that resulted in repeated bouts of gangrene when Jennings exacerbated the wounds with foreign agents such as toothpaste and battery acid. that Jennings lacked the ability to form specific intent to kill, rape, rob or burglarize, or to premeditate or deliberate.

Relying on *McMann v. Richardson*[14], *Strickland v. Washington*[15], *and Williams v.*

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[12] Ninth Circuit opinion, Petitioner's Appendix at13-14.

[13] An expert testified on behalf of the state at the evidentiary hearing. Dr. James Missett never interviewed Jennings, or any witness associated with the case. Thus, his testimony was of little value to the proceedings. But, in any event, as the Ninth Circuit noted, the real issue was that the jury should have heard testimony about Jennings' mental state, based on the information developed during habeas proceedings. See Ninth Circuit Opinion, Petitioner's Appendix at 20.

[14] 397 U.S. 759, 771 n. 14 (1970).

[15] 466 U.S. 668, 694 (1984).

Taylor[16], the Ninth Circuit found[17] that trial counsel's failure to investigate mental defenses was not tactical, and was unreasonable, given the evidentiary clues he had that Jennings suffered from life long, severe mental impairments, which had been exacerbated by his long term intravenous use of methamphetamine. The court below also relied on unremarkable circuit precedent[18] on attorney ineffectiveness in reaching these conclusions. In sum, Attorney Oliver failed to uncover information virtually identical to that discussed in *Williams v. Taylor*. He failed to investigate evidentiary leads which could have established guilt phase mental defenses because he did not carry out these basic investigative tasks. His decision to not to put on a mental defense cannot therefore be defended as tactical pursuant to *Strickland,* because the decision was uninformed.

A final and most compelling reason exists for rejecting review of this case – a reason that weighed heavily in the circuit's decision[19] to grant relief. Just before this case went to trial, the California Supreme Court issued its decision in *People v. Mozingo.*[20] The state court held that trial counsel had a duty to investigate mental defenses in a capital case, even if that defense might conflict with an alibi defense that defense counsel had been developing. This case was brought to Attorney Oliver's attention by both the

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[16] 529 U.S. 362 (2000).

[17] Ninth Circuit Opinion, Petitioner's Appendix at 10-11, 23.

[18] *Seidel v. Merkle,* 146 F.3d 750, 755-56 (9th Cir. 1998); *Bloom v. Calderon,* 132 F.3d 1267 (9th Cir. 1997).

[19] Ninth Circuit Opinion, Petitioner's Appendix at 16-17.

[20] 34 Cal.3d 926 (1983).

prosecutor and the trial judge. Although Attorney Oliver assured the court that he was complying with *Mozingo*, testimony at the evidentiary hearing, including that given by Attorney Oliver himself, that he never did. So, even state law demanded that Attorney Oliver conduct the investigation into Jennings' mental state under these circumstances.

In sum, the Petition for Certiorari is riddled with factual misstatements and erroneous legal assertions. The trial record itself - not some post hoc habeas hearing, as Petitioner claims -- demonstrates that Jennings wanted mental defenses asserted on his behalf. Moreover, those defenses were supported by lesser included offense instructions actually given at trial – but were lacking the evidentiary support which would have permitted the jury to meaningfully decide if Jennings was guilty of the lesser crimes of second degree murder, voluntary manslaughter or involuntary manslaughter.

For all of these reasons, the Petition for Certiorari should be denied.[21]

DATED: Nov. 18, 2002

Respectfully submitted,

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MICHAEL WAYNE JENNINGS

[21] As noted above, the second "question" posed by Petitioner is not really a question at all, but a complaint that this and other cases decided by the Ninth Circuit have ignored this Court's controlling decisions. We have established above that the opinion issued by the Ninth Circuit was based squarely on appropriate decisional authority of this Court. As a result, there is no need to reply further to that "question".

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CERTIFICATE OF SERVICE

I hereby certify that three copies each of the foregoing Reply to Petition for Writ of Certiorari have been mailed, by first class mail, prepaid, to JOHN DEIST, Deputy Attorney General, Counsel of Record for Petitioner, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, this 18th day of November, 2002. All persons required to be served have been so served.

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